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Nos. 91-155 & 91-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AND BRIAN RUMBAUGH,
Petitioners,

v.

WALTER LEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") moves for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have granted their consent to the filing of said brief. Respondent has refused its consent. In support of this motion the AFL-CIO states as follows:

1. The AFL-CIO is a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and women.

2. Historically, the AFL-CIO and its member unions, have had a vital interest in the First Amendment rights

of citizens to disseminate their views among the public by handbilling and other peaceful means. Indeed, many of the leading cases that this Court has decided in the First Amendment area—including many of the "public forum doctrine" cases—have involved the efforts of union members to engage in peaceful handbilling and other expressive activities. *See, e.g., Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147, 155 (1939); *Thornhill v. Alabama*, 310 U.S. 80 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945); *NLRB v. Fruit Packers*, 377 U.S. 58 (1964); *DeBartolo v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988). Because of the AFL-CIO's vital interest in this area, the Federation has filed briefs as an *amicus curiae* in a substantial number of this Court's recent "public forum" cases. *See, e.g., United States v. Kokinda*, —— U.S. ——, 58 L.W. 5013 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).

3. Respondent in this case has argued, *inter alia*, that the government, in order to minimize public congestion and annoyance, may broadly prohibit members of the public from engaging in any handbilling activities on a public property other than a street or park, unless the government has purposefully dedicated the property to public expressive activities. Should such a broad argument be accepted by this Court, the ability of citizens to peacefully disseminate their views to the public at large would be severely curtailed. The attached brief *amicus curiae* examines those prior decisions of this Court—and their underlying logic—which have established and defined the right of a citizen to disseminate ideas to fellow citizens on public properties that have traditionally been open for public gathering and free communication. As we show, the bounds of this right are far broader than respondent concedes, and more than broad enough to invalidate the rule at issue in this case.

4. In preparing the attached *amicus curiae* brief, we have consulted with counsel for petitioners to ensure that the views and arguments therein will not merely be repetitive of those presented in petitioners' brief. The AFL-CIO has also requested consent from all parties for the filing of the attached *amicus curiae* brief. Counsel for petitioners has given the AFL-CIO consent. Counsel for respondent initially gave consent; but, after this Court granted a motion by petitioners for an extension of time for the filing of petitioners' brief, counsel for respondents refused consent for the filing of the attached *amicus curiae* brief unless it was filed and served pursuant to the original, unextended schedule.

5. This motion, with the attached brief, is being filed and served within the time allowed by the Court for the filing and service of the brief of petitioners, as provided in the rules of this Court.

CONCLUSION

For the above-stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The interest of the American Federation of Labor and Congress of Industrial Organizations in this case is set forth in the foregoing motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Port Authority of New York and New Jersey ("Authority") absolutely prohibits any individual, while present in any of the public interior places of the three major New York metropolitan airports, from distributing to "passers-by in a continuous or repetitive manner" *any "printed or written material" whatsoever.* Appendix to Petition in Case No. 91-155 ("Pet. App.") at 84. The

Authority does *not* provide for any means of obtaining an exception based on a willingness to respect reasonable limits on the time, place, or manner of a proposed distribution, or for any system of permits that would allocate, on a non-discriminatory basis, the opportunity to distribute writings to others in a peaceful and nondisruptive manner.

The Authority's rule thus effectively bans *all* efforts by members of the public to disseminate written ideas among the many millions who pass through these massive and bustling crossroads of national and international commerce. And, the Authority has done so regardless of how compatible and inoffensive any particular distribution would be to its various legitimate interests.

Closing a location that has traditionally served as a place of public gathering and interaction to all literature distribution strikes at the very heart of the First Amendment's fundamental rights of free speech and free press. The decision of the court of appeals holding this anti-distribution rule unconstitutional should be affirmed.[1]

---

[1] The Authority also prohibits soliciting funds from "passers-by in a continuous or repetitive manner" in the public interior places of the airports. Pet. App. 84.

The court of appeals upheld this rule reasoning that this Court's recent treatment of a solicitation rule in *United States v. Kokinda*, —— U.S. ——, 58 L.W. 5013 (1990), justifies prohibitions on face-to-face solicitations that would *not* be justified regarding literature distributions. *See International Society for Krishna Consciousness ("ISKCON") v. Lee*, 925 F.2d 576, 581-82 (2nd Cir. 1992).

Although we believe that the Authority's prohibition of literature distributions and its prohibition of solicitations are both unconstitutional, we will only discuss the prohibition on literature distributions in this brief. We focus on the prohibition of literature distributions because we regard the activity of peacefully disseminating written materials to the public in a place of traditional public gathering as perhaps the purist and most basic exercise of the rights of free speech and free press protected by the First Amendment, and thus the exercise most entitled to public concern and to constitutional protection. See p. 12, *infra*.

The interior air terminal spaces subject to the Authority's absolute ban on literature distributions include many public places entirely open to the public that are frequented by vast numbers of persons from all corners of the nation and the world who shop, spend idle time, and otherwise interact in a generally unstructured and unmonitored manner. As the magistrate below found:

> The airport terminals under Port Authority control are busy places containing large open lobbies and corridors lined with a variety of shops, restaurants, and other businesses. . . . For example, the second-floor lobby of the International Arrivals Building at Kennedy is bordered by two restaurants, two snack bars, a bar, a postal facility, a bank, a telegraph office, a duty-free boutique, a drug store, a nursery, a barber shop, and two currency exchange facilities; it also contains a dental office and a place for the display of art exhibits. . . . The second-floor corridors are lined by eight duty-free shops, four bars, two snack bars, a bank, two currency exchanges, two bookstores, two newsstands, two cookie/candy shops, four travel insurance areas, a cash/traveler's check machine, and a retail Bloomingdale's; they also contain seating facilities and free-standing advertising displays.
>
> The Port Authority-controlled areas are open to the public at all times. The Port Authority does not deny or monitor the access of the general public to the three airport complexes or to the general-circulation areas in the buildings. . . . Thus, the facilities are freely available to all persons, whether or not they have travel-related tasks. . . . In 1986, the airports served 78,846,000 passengers; this number is expected to increase to 110 million in the 1990s. [Pet. App. 53-54 (internal citations omitted).]

In these respects, the airport terminal areas at issue here are not materially different from those in other major public terminal facilities, all of which have become public gathering places in which citizens freely meet

and exchange information and opinion. And, for decades, every court of appeals that has confronted issues relating to First Amendment activities in such terminals has agreed that these locations are wholly appropriate places for citizens to exercise their First Amendment right to disseminate ideas and written materials to the public.[2]

These numerous and consistent judicial decisions recognize the social fact that the major transportation centers of our society—where millions from varied origins and with diverse destinations freely congregate, sit, shop, rest, eat, and generally intermingle—are places where, for decades, handbilling and other First Amendment activities have been pursued without disruptive, or other deleterious, effect.[3]

The Federal Aviation Administration ("FAA") has likewise recognized that "it has become common practice for various religious and non-profit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities." FAA,

[2] *See, e.g., Jamison v. City of St. Louis*, 828 F.2d 120 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); *Southwest Africa/ Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983) *("Southwest Africa")*; *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Rosen v. Port of Portland*, 641 F.2d 124, 1245-46 (9th Cir. 1981); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975) *("CAMP")*; *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968). *See also ISKCON v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *Kuszynski v. City of Oakland*, 479 F.2d 1130, 1131 (9th Cir. 1973).

[3] The court below recognized this "unanimous authority" as "well-established" and of "considerable weight," and went on to hold that the Authority's rule banning all literature distributions is unconstitutional, even though the court affirmed the validity of the anti-solicitation provisions contained in the Authority's rules. *See* note 1, *supra*.

Solicitation and Leafletting Procedures at National and Dulles International Airports, 45 Fed. Reg. 35314 (1980) ("FAA Notice of Rule"). And, the FAA has, consistent with the unanimous view of the courts of appeals, concluded that, because of "the considerable amount of social and commercial interchange in [airport] terminals," parts of these terminals are "in many respects . . . like any other public thoroughfare where there is no question that the Constitutional guarantees of freedom of speech, the exercise of religion, and the right of peaceable assembly apply." *Id.* The FAA, in administering its own airports, has, moreover, accepted the reality that handbilling and other First Amendment activities can be carried out without interfering with a major airport's substantial interests, as long as such activities conform to reasonable time, place, and manner restrictions. *Id. See also* 14 C.F.R. §§ 159.93-.94 (1991) (rule establishing time, place, and manner restrictions for handbilling at National and Dulles Airports) ("FAA Rule"); 45 Fed. Reg. 70237 (1980).

In this litigation the Authority has argued that this unanimous and well-established understanding should be rejected in favor of the rule that the government may prohibit *all* distributions of literature within the interior public spaces of air terminals. The Authority contends that areas within public air terminals—whatever their use—are not *intended* to be used for public discourse. *See* Brief of Respondent to Petition for a Writ of Certiorari ("Resp. Br."), at 15. And the Authority adds that this Court's recent precedents have effectively limited the right to disseminate writings on public locations to traditional "streets and parks alone," leaving the government free to totally prohibit such activities *in all other public locations*. *See ISKCON v. Lee*, 721 F.Supp. 572, 577 (S.D.N.Y. 1989) (discussing the Authority's argument that a total ban on airport leafletting is valid because "the scope of the traditional public forum . . . classifica-

tion is a narow one, limited to 'streets and parks' alone, both of which [the Authority] categorizes as a 'unique species of public property' ").

This line of argument denies all generative import to a fundamental premise of our First Amendment law, and would destroy the principled foundation of that law. *See* pp. 21-25, *infra*. Of at least equal consequence, "[a]s society becomes more insular in character," *United States v. Kokinda*, —— U.S. ——, 58 L.W. 5013, 5018 (1990) (Kennedy, J.), the Authority's approach would, as a practical matter, severely inhibit "the free flow of ideas and opinions" that is "[a]t the heart of the First Amendment." *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). *See* pp. 26-27, *infra*.

2. In Part I of this brief, we examine the constitutional considerations that led this Court, more than 50 years ago, to uphold a citizen's right to distribute written materials in those public places where the public has traditionally been free to gather and exchange views. Citizens disseminating their ideas among the public in this fashion are participating in the processes of public debate through which the citizenry as a whole formulates its sovereign will to direct the government. *See* pp. 8-9, *infra*. Recognizing this, the decisions of this Court have repeatedly held that when the government holds property open for the free and unstructured use of the gathering public, members of the public have a constitutional right to peacefully engage in such activities as the distribution of handbills. *See* pp. 9-12, *infra* (discussing cases).

More recent cases holding that various forms of public property need not be made available to individuals seeking to use them for expressive purposes have not involved public locations where citizens have been traditionally free to gather and exchange views, but have involved instead

individual demands of access to government properties that have traditionally been devoted only to more specialized, limited, and structured public uses, or to specialized, government-sponsored and managed media of communications. These more recent cases, however, have not questioned the continued vitality of the principle that where public property is held for free public gathering and interchange, the government may not prohibit efforts by members of the public to engage in such activities as handbilling in order to disseminate their views. *See* pp. 12-14, *infra*.

In Part II, we examine the status of the public areas of major air terminals within this framework. As we show, air terminals contain extensive areas designed to replicate the public streets and plazas, to be held continuously open to the public, and to invite the public to gather and engage in free and unstructured use, including, as members of the public see fit, free discourse and the exchange of ideas and views. *See* pp. 14-17, *infra*. On these properties, just as on the streets, handbilling can be—and has been—regularly conducted in a wholly nondisruptive manner. *See* pp. 17-18, *infra*. Moreover, these areas, as places where people with varied origins and destinations congregate and meet, are uniquely valuable for the exchange of information and ideas among the gathering public at large. In essence, transportation terminals connect a locality to the outside world and to outside ideas, and, for this reason, have traditionally been used for extensive communicative activities. *See* pp. 18-19, *infra*. For all these reasons, handbilling has been a normal activity in air terminals for some time. Indeed, the tradition of using air terminal public areas for such communicative activities as handbilling extends over a significant portion of the history of the large, public, commercial air terminal. *See* pp. 19-20, *infra*.

All this being so, the public areas of air terminals are squarely within the free-speech and free-press prin-

ciple that this Court has recognized; *viz.*, that in those public areas where citizens have been traditionally free to gather and exchange views as they wish, such activities as handbilling are constitutionally protected. *See* pp. 20-21, *infra*.

ARGUMENT

1. The Purposes Of The First Amendment And Of The Public Forum Doctrine

A. In evaluating the Port Authority's position in this case, it is helpful to begin by recalling some very basic propositions about the purposes of the First Amendment generally, and the purposes of the public forum doctrine particularly.

1. This Court has long recognized that the First Amendment rights of free speech and free press are at the very foundation of our system of government, which is based on the "consent of the governed." *See New York Times v. Sullivan*, 376 U.S. 254, 273-75 (1963).[4] "The consent of the governed" implies not only that consent shall be uncoerced, but also that it shall be informed. Free access to the ideas and views of our fellow citizens is thus essential if our government and our culture are to reflect the free deliberative choices of our citizenry. *See Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system"); *see also* T. Emerson, The System of Freedom of Expression, at 7 (1970).

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[4] *Cf.* The Federalist No. 39, at 190 (Bantam ed. 1982) (Madison) (defining "republic" as a political system in which all authority is derived "from the great body of the people"); The Declaration of Independence, para. 2 (1776) ("Governments . . . deriv[e] their just powers from the consent of the governed").

The First Amendment, therefore, "assure[s] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). And, a citizenry denied by the government the *practical* opportunity to freely share information and views, debate, and deliberate is denied "the absolute sovereignty" which our system presumes shall forever rest with "[t]he people, not the government." *New York Times v. Sullivan*, *supra*, 376 U.S. at 274 (*quoting* James Madison's comments on freedom of the press, 4 Elliot's Debates, at 569-70 (1891 ed.)).

The First Amendment rests as well on the premise that the free interchange of ideas is necessary to "secure [for the citizenry] 'the widest possible dissemination of information from diverse and antagonistic sources.'" *New York Times v. Sullivan*, *supra*, 376 U.S. at 266 (*quoting Associated Press v. United States*, 326 U.S. 1, 20 (1945)). As this Court recently declared, "[t]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but is also essential to the common quest for truth and the vitality of society as a whole." *Hustler Magazine v. Falwell*, *supra*, 485 U.S. 46, 50-51 (1988) (*quoting Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984)).

In the words of Judge Learned Hand, "[t]o many this is, and always will be folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943) (*quoted in New York Times v. Sullivan*, *supra*, 376 U.S. at 270).

2. These First Amendment principles are the foundation of the line of precedents that treat with a citizen's right to broadly disseminate ideas to the public at large while present on those public locations upon which the public has traditionally gathered. Professor Stone has aptly summarized their point as being that

> The right to freedom of speech cannot exist in the abstract. It necessarily presupposes the right to communicate. In the absence of an effective and meaningful opportunity to reach the relevant audience, the theoretical right of expression would be hollow. [Stone, *Fora Americana; Speech in Public Places*, 1974 Supreme Court. Rev. 233, 245.]

In *Hague v. CIO*, 307 U.S. 496, 501 (1939), this Court held unconstitutional a municipal ordinance which prohibited *inter alia* the distribution of leaflets and pamphlets on "any street or public place." Justice Roberts' plurality opinion rejected the proposition that, because the government owned the public places at issue, the people's ability to engage in such First Amendment activities was "absolutely under the control of the legislature." *Id.* at 515. "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Id.* at 513 (*quoting United States v. Cruikshank*, 92 U.S. 542, 552-53 (1875)). That being so, "communicating thoughts between citizens, and discussing public questions," entailed a "use of the streets and public places [that] has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Id.* at 515. As Justice Roberts emphasized, the government's interest in the ownership of the property at issue was not analagous to a private individual's interest in the ownership of his property. Rather, the property at issue was "held in trust for the use of the public." *Id.*

In *Schneider v. State*, 308 U.S. 147 (1939), the Court expanded on the lessons of *Hague* and invalidated a series of municipal ordinances which *inter alia* made it "unlawful for any person . . . to circulate or distribute any . . . circular, hand-bills, cards, posters, dodgers or other printed . . . matter . . . in or upon any sidewalk, street, alley, wharf, boat landing, dock, or other public place, park, or ground." *Id.* at 155. In rejecting the argument

that such ordinances advance the municipal interest in reducing litter and congestion, the Court stated, "We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." *Id.* at 162:

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. . . . Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of the democratic institutions. [308 U.S. at 161 (footnote omitted).]

Jamison v. Texas, 318 U.S. 413, 416 (1943), once again emphasized the importance of a citizen's right to spread ideas to the public in public places:

> [O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communications of ideas by handbills and literature as well as by the spoken word.

And the Court reaffirmed this principle in *Martin v. City of Struthers*, 319 U.S. 141, 146-147 (1943):

> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal means . . . that stringent prohibition can serve no purpose but that

forbidden by the Constitution, the naked restriction of the dissemination of ideas. [*Id.* at 146-147.]

3. The importance of *Hague v. CIO* and its progeny to the health of our system of free expression and self-government cannot be overstated. Put simply, most citizens wishing to participate in the broad public debate do not have access to the privately-owned mass media. For these citizens, effective opportunities to reach their fellow citizens in public places are of the essence.

The right to peacefully distribute handbills in public places in order to disseminate one's views to the public is thus the paradigm of a citizen's exercise of his rights of free speech and free press. *See, e.g., Lovell v. Griffen*, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest."); *Martin v. City of Struthers, supra*, 319 U.S. at 147 ("distribution of circulars is essential to the poorly financed causes of little people"); *see also Ex Parte Jackson*, 96 U.S. 727, 733 (1878) ("Liberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.").

B. The constitutional doctrine that the government must permit communicative activities among the public on those public properties where citizens have traditionally been permitted to assemble and engage in free discourse has been repeatedly reaffirmed. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988); *United States v. Grace*, 461 U.S. 171, 176-77 (1983); *Carey v. Brown*, 447 U.S. 455, 460 (1980); *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976).

At the same time, however, new issues have arisen regarding the nature and extent of a citizen's right of access to various forms of public property *other than those*

that have been traditionally open to public assembly and the free interchange of ideas. Recent cases have focused on individuals seeking to use specialized, government-established media of communication for distribution of their messages, *see, e.g., Cornelius v. NAACP Leg. Def. Fund*, 473 U.S. 788 (1985) (federal workplace charity drive); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983) (internal office mail system); and on individuals seeking access to highly specialized public property which traditionally has not been open to the general public for free gathering and discourse, *see, e.g., Greer v. Spock*, 424 U.S. 828 (1976) (access to military base); *Adderly v. Florida*, 385 U.S. 39 (1966) (access to prison grounds).

As the opinions explain, in these contexts the Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum." *Cornelius, supra*, 473 U.S. at 800. In order to weigh those interests, the Court has "identified three types of fora: the traditional public forum, the public forum created by government designation, and the non-public forum." *Id.* at 802.

In the first category, the "traditional public forum"—which includes those public places, like streets and parks, where members of the public have been traditionally free to gather and communicate with each other as they see fit—the government's ability to prohibit expressive activity is sharply circumscribed. *Cornelius, supra*, 473 U.S. at 802. Generally, in such places, the government may only "enforce regulations of the time, place, and manner of expression which are content-neutral, narrowly tailored to serve a significant government interest, and leave open

ample alternative channels of communications." *Perry*, *supra*, 460 U.S. at 45.[5]

In the second category, the "designated public forum" —which includes those government properties intentionally devoted to the purpose of public debate—the same rules apply. *Perry*, *supra*, 460 U.S. at 45-46.

And, in the third category, the "nonpublic forum," the "State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable." *Id.* at 46. Of course, even in this category, "[t]he reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in light of the purpose of the forum and all surrounding circumstances." *Cornelius*, *supra*, 473 U.S. at 809.

II. The Airport Terminal As A Public Forum

A. As we have already noted, *see* pp. 3-5, *supra*, "an unusual consensus of judicial, legislative and administrative opinion would classify the public areas of [airport terminals] squarely within the public forum family." *Southwest Africa*, *supra*, 708 F.2d at 766. These decisions are the result of repeated and detailed analyses of the structure and functions of modern airport public

[5] As the Court has emphasized, the requirement that "regulations of the time, place, and manner of expression" must be "narrowly tailored to serve a significant government interest" operates to prevent governments from improperly banning expressive activities from the particular public forum locations reasonably chosen by a speaker, *even when the government allows expression at alternative sites. See, e.g., United States v. Grace*, *supra*, 461 U.S. at 180-81 (rejecting argument that prohibition of leafletting on Supreme Court's sidewalk was a reasonable regulation of "place" because leafletting was still permitted on other sidewalks in "the vicinity of the Supreme Court"; specific prohibition at issue must have "sufficient nexus with . . . the public interests . . . urged as its justification"). *See also Schneider*, *supra*, 308 U.S. at 163 ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

areas as well as of the traditional and intended uses to which these areas have been put.

In essence, the consensus reflects that the public areas of airports are held for public use in the same way as are streets and parks—*viz.*, for generally unstructured and unmonitored use, so that members of the public are free to sit, walk, wander, meet, congregate, converse, discuss, and debate, as they see fit—and that the communicative activities that members of the public may choose to pursue in these areas do not impede the realization of any valid overriding governmental interest.

First, public terminal areas are functionally and structurally similar to public streets and plazas. These areas typically contain "many of the facilities and services of a fair-sized municipality," (*Southwest Africa*, *supra*, 708 F.2d at 864), including facilities "where air travelers as well as the general public may shop, dine, imbibe, and sightsee" (*Fernandes*, *supra*, 633 F.2d at 627).

The terminals in the present case, for example, contain large plazas for sitting, talking, and waiting, which are lined by cocktail lounges, informational displays, art displays, banking facilities, and a boutique. The public areas of an airport not only appear physically similar to public streets, but like a street, invite the members of the public to spend substantial free and unstructured time, during which they may freely wander, shop, meet others, congregate, converse, debate or pursue whatever other lawful activities they may choose. *See* p. 3, *supra*; *see also* Pet. App. 53-54.

Indeed, the presence of these myriad facilities reflect a conscious effort by the airport authority to replicate, for use by the public in the airport community, the very essence of the diverse and busy public commercial street.[6]

[6] *Compare United States v. Kokinda*, *supra*, 58 L.W. at 5015 (plurality opinion) ("postal sidewalk was constructed solely to assist

Second, as is the case with public streets and parks, the government makes no effort whatsoever to limit who may enter the public airport terminals. These public areas, like the streets and parks, are wholly and continually open to any member of the public who wishes to enter. As with streets and parks, persons need not identify themselves, record their presence, or announce their purposes. *Cf. Fernandes*, *supra*, 663 F.2d at 627 ("The analogy between these terminals concourses and public streets is further strengthened by the lack of restrictions on public access to the commercial establishments located along the . . . passageways. . . ."). Indeed, the general public may enter not only for travel-related reasons, but to use the shops and other facilities of the terminal or to spend idle time in any lawful way. Thus, as with a public street, members of the public have an open invitation to pursue their chosen affairs in these areas.

Third, to the extent the purpose of the public spaces of a modern transportation terminal can be characterized as a specialized one, it is the *same* "specialized" purpose that characterizes public streets; *viz.*, to facilitate movement and transportation. Certainly the movement of people through terminal avenues toward the entrances to airport gate areas is no different an activity than the movement of people through public streets toward subway stations, bus stops, or ferry landings. In this regard, the Second Circuit's earlier discussion of New York's bus terminal is equally relevant here:

> [Passengers] are in the Terminal for the principal purpose of moving to and from other means of . . . transportation—and the space is designed for precisely the purpose of transit. With the scope of operations so vast, the enclosure is desirable and indeed necessary if the congestion and confusion that would

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postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood").

> attend if all waited for buses on the street are to be avoided. In other times or better climes travelers have waited by the roadside or under some shelter for the oncoming vehicle. But here, the buses drive into the building and the passengers meet them there. The terminal, with its many adjuncts, becomes something of a small city—but built indoors, with its "streets" in effect set atop one another, and vehicles operating under, above, and to the side, not unlike some futuristic design for urban living. [*Wolin*, *supra*, 392 F.2d at 89.]

As *Wolin* so convincingly demonstrates, the terminal plazas and avenues at issue here, though enclosed, serve no function other than that which streets have traditionally served. Certainly the mere presence of a roof cannot make a difference in First Amendment jurisprudence. Covered public streets and commercial districts have existed in many cities for centuries, and exist today in such cities as Minneapolis and Spokane where weather conditions render such enclosures necessary. Meteorology, transportation technology, and public architecture have not heretofore been thought to be the sciences that limit the scope of the First Amendment.

Fourth, an airport terminal shares the characteristics that make expressive activity appropriate to, and compatible with, the myriad other activities that take place on an urban street. Unlike an office or a courthouse, for example, a terminal's normal uses are not those that require silence, privacy, or solitude: its inhabitants are not normally engaged in solemn or reflective activities. *See Wolin*, *supra*, 392 F.2d at 89; *see also CAMP*, *supra*, 508 F.2d at 925. Rather, like a street or a covered downtown marketplace, a terminal is often "attended with noisy crowds and vehicles, some unrest and less than perfect order." *Wolin*, *supra*, 392 F.2d at 90. And, when such active and stimulating tumult is the natural condition of a public area, there is no realistic need to sup-

press expressive activities such as handbilling in order to assure the area's smooth, uninterrupted operation.[7]

Put simply, the terminal spaces, like city streets, are locations where neutral and reasonable time, place, and manner restrictions on expressive activities can accommodate all substantial competing interests of the government and of the public. There is simply no legitimate need for the government to go further and enact a total prohibition. *Cf.* FAA Rule, *supra* (establishing detailed time, place and manner restrictions on leafletting at Dulles and National Airports); FAA Notice of Rule, *supra*.[8]

Fifth, the public areas of air terminals are by their nature an invaluable location for communicative activities. Like other transportation terminals, air terminals connect a locality to the outside world, and to the outside world's peoples and ideas. Because of this unique attribute of transportation terminal areas, prohibiting expressive activities in such locations has a particularly deleterious effect on the ability of citizens to spread their ideas to those from other regions and to learn from those who wish to spread distant ideas to them.

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[7] We emphasize in this regard that the expressive activities here present no issues of perceived government sponsorship of any particular message or of abdication of government control over its own specialized means of communications. *Compare Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Cornelius*, *supra*; *Perry*, *supra*. As with expressive activities on the streets, all understand that expressive activities in air terminals are wholly private activities engaged in by private citizens who are exercising their First Amendment rights in a public gathering place.

[8] As we have noted, for many years, it has now been the law—as developed by the unanimous holdings of the courts of appeals—that interior airport public places are public fora. This law has not caused any significant problems in the nation's air transit system precisely because reasonable time, place, and manner restrictions, like those that apply to urban streets, can—and indeed do—adequately protect all significant interests, while allowing continued use by the public of these places for communicative activities. *See* pp. 3-5, *supra*.

This attribute of transportation terminals has been recognized—and acted on—throughout our history. For example, whistlestop political speeches at rail terminals have been parts of countless political campaigns and, indeed, have become a part of our political folklore. More recently, "freedom riders" used the facilities of bus terminals to spread the ideas of the civil rights movement throughout the South. And, in contemporary America, we are all familiar with the phenomenon of crowds of well-wishers, protesters, photographers and journalists—and simply the curious—gathering at airports to witness the arrival or departure of a politician, public figure, sports team, or wartime military unit, with the event often accompanied by speeches and rallies, and with free expressions of views among those who attend.

The fact that a transportation terminal connects the people and ideas of a locality with those of the outside world influences communicative activities in the terminal in a more commonplace way as well. A terminal is a place in which people from varied and distant regions—who may have quite different views and backgrounds—may meet freely and communicate ideas. It is precisely this attribute of a terminal—the unique opportunity to reach an audience from a different region with a different message—that has motivated handbillers, for a wide variety of causes, to select the terminal as a location for exercising their rights of free speech and press.[9]

Finally, as the years of cases relating to airport handbilling and solicitation practices reflect, there is in fact

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[9] Handbillers in transportation terminals may often be seeking to communicate with a particular audience that may be far too dispersed or otherwise difficult to reach outside of the terminal. In *Wolin*, for example, the handbiller was seeking to communicate an anti-war message to soldiers who came from outside the New York area, but who passed through the terminal in great numbers. 392 F.2d at 90-91.

a specific and significant tradition of using the public areas of airports and other terminals as places for engaging in public expressive activities. *See* pp. 3-5, *supra*. It is highly relevant in its own right that—*for a significant portion of the history of large urban airports*—many members of the public have indeed used air terminals for precisely the expressive purposes at issue here. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815, n.32 (1984) (referring to the public forum as government property "clearly held in trust, either by tradition *or recent convention*, for the use of citizens at large") (emphasis added). The decisions that we have reviewed above concerning terminal facilities establish that there is *at least* a "recent convention" of the use of such facilities for the specific expressive purpose of handbilling. Moreover, given that the social importance of commercial air travel is itself a relatively recent phenomenon, the extensive tradition of using air terminals as places for this activity of public discourse should carry particular weight.

* * * *

Taken together, the foregoing factors make clear that the public interior areas of air terminals are places where members of the public have traditionally had the full freedom to conduct themselves in the same manner as they are free to do in the public streets and parks. This includes the freedom to meet together in an unstructured and unmonitored manner as free citizens and, as such, to assemble, converse, discuss, and debate whatever subjects they may choose. For these constitutionally weighty reasons, "it seems clear that the public places in these airports are far more akin to such public forums as streets and common areas than they are to such non-forums as prisons, buses, and military bases." *Southwest Africa*, *supra*, 708 F.2d at 764.[10] It follows, we sub-

[10] *Compare Adderly v. Florida*, 385 U.S. 39 (1967) (prison grounds not public forum); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (inside of public bus is not public forum); *Greer v. Spock*, *supra* (military base is not public forum).

mit that the airport terminals in the present case constitute quintessential public fora and, thus, that the Authority's total ban on the fundamental free speech and free press right to distribute written materials is unconstitutional.[11]

B. The Port Authority has based its argument that air terminals are not traditional public fora on two theories: first, that air terminals are distinct from public fora because the "terminals' purpose is *not* 'public assembly and debate' "; rather "their sole purpose is the facilitation of air travel," Resp. Br. 15; second, that this Court's precedents limit the areas to be classified as traditional public fora to "streets and parks alone" so that no other public areas can qualify. *See ISCKON v. Lee*, *supra*, 721 F. Supp. at 577; Resp. Br. 15 & n.12. Neither of these arguments can withstand reasoned analysis.

1. In considering the Authority's first argument, it is useful to return to the early public forum cases. Those precedents make unmistakably clear that the public forum concept, even at its inception, in no way turned upon whether a particular location was created *for the specific purpose* of facilitating free public debate. Rather, the relevant inquiry is whether the place in question has been held open for unstructured and unmonitored use, which would include free communication among free citizens.

This understanding of the relevant inquiry is evident as early as *Hague*, which emphasized that the public

[11] *Heffron v. ISKCON*, 452 U.S. 640 (1981), is not to the contrary. The question in *Heffron* was not whether the forum in question (a state fairground) was a public forum, but whether the challenged restriction—which confined leafletting and solicitation to assigned booths—constituted a reasonable time, place, and manner regulation in light of the particular nature of the state fair. *See Heffron*, 452 U.S. at 647-48. If the Authority here had only restricted literature distribution to specified areas within the airport terminal, a very different case would be presented.

areas at issue had been places that free citizens traditionally *had used* for gathering together in public and for communicating among themselves according to their wishes, not that these were places created by governments *for the purpose* of facilitating such gatherings or communications. Indeed, *Hague*'s whole point is that such communicative activities are and always have been normal activities in the public lives of free citizens—and for that reason are not subject to government prohibition—not that such activities are to be conducted only at locations to be created by the government for such purposes. As *Hague* put it, the relevant public places "have immemorially been held in trust for the use of the public *and*, time out of mind, *have been used* for purposes of assembly, communicating thoughts between citizens, and discussing public questions." 307 U.S. at 515 (emphasis added).

This is as it must be. As all have recognized, the principal purpose of streets (and airports) is transportation. And this point has been repeated in precisely those cases which have emphasized the right of citizens to use the streets for peaceful expressive activities. *See, e.g., Schneider, supra*, 308 U.S. at 160 ("Municipal authorities, as trustees for the public, have the duty to keep their community's streets open and available for movement of people and property, the primary purpose to which streets are dedicated."); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) ("Governmental authorities have the duty and responsibility to keep their streets open and available for movement.").[12]

The governing rule is that the First Amendment nonetheless requires that the weighty free speech rights of

[12] The public forum cases reaffirming the people's right to use *parks* for the dissemination of ideas have similarly recognized that the primary purpose of parks is recreation, not expression. *See, e.g., Hague, supra*, 307 U.S. at 505 ("there is no competent evidence that the parks of Jersey City are dedicated to any general public purpose other than the recreation of the public").

the people be accommodated in the operation of the streets and parks. *See generally, Niemotko v. Maryland*, 340 U.S. 268, 276 (1951) (Frankfurter, J., concurring) (the issue in cases concerning the dissemination of ideas in public places is "how to reconcile the interest in allowing free expression of ideas in public places with the protection of the public peace and of the primary uses of streets and parks").

In short, neither streets nor parks are maintained for the principal purpose of providing a place for expression. But this Court has nevertheless repeatedly held that such public areas—*as places where free citizens have been free to gather and communicate*—are public fora.[13]

There is yet another reason why the early public forum cases demonstarate that a location's status as a "traditional public forum" cannot depend on whether it is the government's purpose that the location be a place for expressive activity. In every one of those cases, and in their progeny, the government clearly and unequivocally *denied* having *any* such purpose. It is precisely

[13] Of course, the primary purposes of streets, parks, and other public locations are relevant to the ultimate validity of any time, place, or manner restriction on speech. Even in the most traditional public forum, expressive activity may be limited through neutral, reasonable, and narrowly tailored time, place, and manner regulation:

> The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. [*Hague*, 307 U.S. at 515-16.]

The point is that the non-expressive purposes of the public location do not foreclose or determine the public forum inquiry; rather, these purposes are taken into account in the consideration of what regulations of time, place, and manner will be considered reasonable. *See also Schneider, supra*, 308 U.S. at 160-61; *Grayned v. City of Rockford*, 408 U.S. 102, 115-17 (1972); *Heffron, supra*, 452 U.S. at 647-48 & n.10.

because governments have repeatedly *refused* to dedicate public places to public expression—and instead have asserted the right to ban such expression—that this Court has been faced with repeated litigation concerning prohibitions on speech in public places. *See, e.g., United States v. Grace, supra* (ordinance prohibiting handbilling on public sidewalk in front of Supreme Court building); *Grayned v. City of Rockford*, 408 U.S. 102 (1972) (ordinance forbidding expressive activities on public sidewalk adjacent to public school grounds); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) (prohibition of rally near courthouse steps); *Cox v. Louisiana, supra* (prosecution for demonstration on public sidewalk in vicinity of courthouse); *Martin v. City of Struthers, supra* (ordinance prohibiting door-to-door leafletting); *Jamison v. Texas, supra*, 318 U.S. at 415 (ordinance based upon city's view "that it has the absolute power to prohibit the use of the streets for the communication of ideas"); *Schneider, supra* (various ordinances prohibiting leafletting in streets, parks, and other public places); *Hague, supra* (same).[14]

2. The Authority's contention that the "traditional public forum" classification is limited to "streets and parks alone" is wholly without merit for a number of reasons.

First, the prior discussions of "traditional public fora" by this Court simply do not support such a conclusion. For example, *Schneider* invalidated a statute which prohibited handbilling on any "street" or "park" as well as on any "*wharf, boat landing, dock or other public place*

[14] In essence, the Authority's insistence that the "traditional public forum" classification apply only to those places purposefully dedicated by the government as places of free expression is, in essence, an insistence that the "traditional public forum" concept and the "dedicated public forum" concept be treated as a single concept. But this Court has recognized that these are *different* concepts. *See, e.g., Cornelius, supra*, 473 U.S. at 802-803; *Perry, supra*, 460 U.S. at 45-46 & n.7.

. . . *or ground*." 308 U.S. at 155 (emphasis added). *Hague* discussed "streets and public *places*." 307 U.S. at 515 (emphasis added). And, later cases have discussed "streets and parks" *as examples* of traditional public fora, rather than as an exclusive list. *See, e.g., Frisby v. Schultz, supra*, 487 U.S. at 480 (street or park is "archetype of a traditional public forum"); *United States v. Grace, supra*, 461 U.S. at 177 (public fora include "'public places' . . . such as streets, sidewalks, and parks"); *Cornelius, supra*, 473 U.S. at 803 (college campus has "many of the characteristics of a traditional public forum"); *Lehman v. City of Shaker Heights, supra*, 418 U.S. at 303 (examples of public fora would include "open spaces, . . . meeting hall, park, street corner, or other public thoroughfare"); *Carey v. Brown, supra*, 447 U.S. at 460 ("streets, sidewalks, parks, and other similar public places"); *Hudgens v. NLRB, supra*, 424 U.S. at 515 (same); *Marsh v. Alabama*, 326 U.S. 501, 504 (1946) ("streets, sidewalks, and public places").

Second, the logic of the public forum cases do not support the Authority's position. As we have explained, these cases do *not* rest on any notion that streets and parks were created by governments as places to be uniquely devoted to public debate. Rather, *Hague* and its progeny rest on the notion that free citizens, whenever they are free to gather in public places of unstructured and unmonitored use, are free as well to conduct the public business of debating public issues. Streets and parks are paradigm examples of such public places, *not* the exclusive examples.

The Authority's assertion that this Court should treat "streets and parks" as the extent of traditional public fora, is nothing less than a call for separating the prior public forum cases from their intellectual foundations and denying those cases all their generative potential. To do this would be to renounce an important aspect of our First Amendment heritage.

Third, to limit the public forum category to traditional streets and parks—as the Authority urges—is likely to have a long-term debilitating effect on the nature of public discourse in our society. Justice Kennedy has warned that "[a]s society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *Kokinda*, *supra*, 58 L.W. at 5018. That warning goes to the heart of this case.

The role played by traditional streets and parks has declined over recent history. As American life has adapted to the automobile, the suburb, and a host of other technological and architectural developments, the normal routines of life have changed. Today, for many of us—perhaps most of us—the casual daily interactions of social life have been removed from the traditional public street and relocated to less traditional, though closely analogous, public locations. If the public forum doctrine is stultified, by treating the doctrine as a historical accident rather than a statement of basic First Amendment principles, then the places for public discourse will grow steadily fewer, and the vitality of our democratic debate will grow steadily weaker.

Given the tragedy that this would represent, the newer locations of public assembly and interchange must be treated as public fora "even though the Government may intend to impose some limitations on the forum's use." *Kokinda*, *supra*, 58 U.W. at 5018 (Kennedy, J.). "If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case." *Id.*

As we have shown, this is a case controlled by the objective considerations that stand behind the public forum doctrine. *See* pp. 15-21, *supra*. As the property is devoted to free and unstructured use of the gathering public, the government must respect the free speech and

free press rights of that public to engage in the public business of free discourse and debate.

CONCLUSION

For the above stated reasons, the judgment of the court of appeals should be affirmed to the extent that it holds unconstitutional the Authority's rule prohibiting literature distributions.

Respectfully submitted,

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